identifying data deleted
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 27 2009

SRC 06 270 51727

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pharmacy. It seeks to employ the beneficiary permanently in the United States as a pharmacist. As required by statute, the petition is accompanied by a Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated February 23, 2007, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by the DOL national processing center. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Alien Employment Certification as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on April 19, 2006. The petitioner filed the Form I-140 on September 15, 2006, and the petitioner identified on that form is [redacted]. at [redacted]., Brooklyn, New York. The proffered wage as stated on the Form ETA 9089 is $39.54 per week ($82,243.20.00 per year).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Relevant evidence in the record includes: a legal brief dated March 15, 2007, from counsel; a copy of the original Form ETA 9089 Application for Permanent Employment Certification approved by DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax return for 2005;[2] a U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; five of the petitioner's business checking account statements for the period May 17, 2006 to September 29, 2006; the petitioner's Employers Quarterly Federal Tax Form (Form-941) statements for the first three quarters of 2006; a letter from counsel dated October 30, 2006, in response to the director's request for evidence dated September 23, 2006; sixteen of the petitioner's business checking account statements for the period April 19, 2006 to September 29, 2006; a re-submittal of the petitioner's Employers Quarterly Federal Tax Form (Form 941) statements for the first three quarters of 2006; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2003 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were "$300,667.00 plus assets" and $305,914.00 respectively. On the Form ETA 9089, signed but not dated by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

---

[1] The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services USCIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 2005 federal income tax return generally.

On appeal counsel asserts that:

- That the petitioner's net income and net current assets stated on the petitioner's 2005 tax return are evidence of the petitioner's ability to pay the proffered wage on the priority date of April 19, 2006; and,
- That the petitioner's net income of $52,711.00 and net current assets of $30,851.00 stated on the petitioner's 2005 tax return are, when added together, sufficient to pay the proffered wage. Counsel cites to the William R. Yates "Yates memo" (U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004) in support of its contention.

Tax returns submitted for years prior to the priority date of April 19, 2006 have little probative value in the determination of the ability to pay from the priority date. Although since the petitioner's 2006 income tax return would not have been available, we will consider the 2005 tax return generally.

Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

However, where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). As the petitioner stated additional deductions on Form 1120S, Schedule K, we have taken the petitioner's net income from Schedule K.

The tax return submitted for 2005 stated net income of (Schedule K, line 17.e) $38,786.00, not $52,711.00 as stated by counsel. The tax return reflected net current assets of $30,851.00. Both amounts would be insufficient to pay the proffered wage of $82,243.

Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. **Its year-end current liabilities are shown on lines 16 through 18.** If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

With respect to the petitioner's argument that net income and net current assets should be combined, no where in the referenced Yates Memo does it state that net income and net current assets can be

added together to demonstrate a petitioner's ability to pay a proffered wage. Counsel contends that the petitioner's 2005 net income should be included with the cash also received by the business for that year as stated on Schedule "L" as current assets. To do so would be duplicative of the petitioner's finances. USCIS will consider separately, but not in combination, the net income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date.

Because of the nature of net current assets, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, for example; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

Counsel has submitted the petitioner's business checking account statements for the period April 19, 2006 to September 29, 2006, and states on appeal that the beginning and ending balance on the checking account demonstrate the petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Further we note that the petitioner has failed to submit sufficient evidence according to the regulation at 8 C.F.R. § 204.5(g)(2) in the form of a tax return for the relevant year, an annual report or audited financial statements.[3]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 9089 Application for Permanent Employment Certification establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In

[3] The petitioner did not submit its 2006 federal income tax return. Based upon the date of filing the appeal, the petitioner's 2006 federal tax return may or may not have been available.

evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient. While the petitioner's 2005 tax return is before the priority date, even if we considered the return, the petitioner's net income was insufficient to pay the proffered wage.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. If we examined the petitioner's 2005 tax return, its net current assets were insufficient to pay the proffered wage.

Counsel has submitted the petitioner's Quarterly Federal Tax Form (Form-941) statements for 2006. While the Form statements show a consistent history of wage payments, the statements do not establish the petitioner's ability to pay the proffered wage. Wage paid to others generally will not demonstrate the petitioner's ability to pay for the instant beneficiary. The Forms 941 do not list payments to any specific individuals, and do not specifically list any wages paid to the beneficiary.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.